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No. 07-1550

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IN THE
Supreme Court of the United States

SOUTHWESTERN BELL TELEPHONE COMPANY
D/B/A AT&T TEXAS,
Petitioner,

v.

TEXAS CABLE ASSOCIATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Petitioner's Statement pursuant to Rule 29.6 was set forth at page iii of the petition for a writ of certiorari, and there are no amendments to that Statement.

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I. THE DECISION BELOW DIVIDES THE CIRCUITS AND DEEPENS CONFUSION REGARDING *SALERNO*

A. The Fifth Circuit held that TCTA could maintain a facial challenge to SB 5 on behalf of its members notwithstanding that it was clear from the face of the complaint (and other record evidence) that not all applications of SB 5 to TCTA's members are unlawful. Based on the *Morales* plurality, the Fifth Circuit held, as TCTA had urged, that *Salerno*'s no-set-of-circumstances standard is inapposite because "TCTA is only asserting the interests of its members in a representational capacity, rather than the interests of third parties not before the court." Pet. App. 16a n.4. TCTA continues to defend (at 10) that position here: TCTA's lawsuit "is not a facial challenge" subject to *Salerno*, TCTA claims, because TCTA "does not seek to vindicate the rights of others." That position directly conflicts with decisions of the Second and Eleventh Circuits, which have held that *Salerno* governs even when an association seeks relief only on behalf of its members. *See* Pet. 12-15.

TCTA denies this conflict by mischaracterizing AT&T's position and misreading the Second and Eleventh Circuit decisions. TCTA contends (at 12) that AT&T has made only a "pleading argument" and that neither the Second nor the Eleventh Circuit has held that the *Salerno* standard "must be pleaded in the complaint." TCTA is wrong on both counts.

First, AT&T's position is not that an association must *recite* the *Salerno* standard in its complaint. TCTA's complaint should be dismissed because it failed to make an allegation — that SB 5 is unlawful in all applications — necessary to the relief it seeks. Indeed, the allegations that TCTA did make conceded

that *Salerno*'s standard could not be met, *see* Pet. 18-19,[1] and legislative evidence (properly considered on a motion to dismiss[2]) confirms that TCTA cannot satisfy *Salerno*'s standard, *see* Pet. 19-20.

Second, TCTA's claim that the Second and Eleventh Circuit decisions impose no pleading requirement on facial challenges is wrong. In *Rent Stabilization Association v. Dinkins*, 5 F.3d 591 (2d Cir. 1993), the Second Circuit held that an *allegation* that "'*many*'" of an association's members "are victims of a taking" effectively conceded the challenged rules were not universally unconstitutional. *Id.* The court held that, "far from alleging" that the rules "act unconstitutionally in every circumstance" — as required under *Salerno* — *the complaint* made clear that the rules were unconstitutional "in only limited subcategories of possible circumstances." *Id.* The Second Circuit's decision thus establishes that an association's *allegations* can plead the association out of court with respect to *Salerno*; under that standard, TCTA's complaint would be dismissed. *See* Pet. 18-21.

In *Georgia Cemetery Association, Inc. v. Cox*, 353 F.3d 1319 (11th Cir. 2003) (per curiam), the Eleventh Circuit affirmed a Rule 12(b)(6) dismissal of an association's facial constitutional claims. Although the association sought relief only "on behalf of its

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[1] *See Early v. Bankers Life & Cas. Co.*, 959 F.2d 75, 79 (7th Cir. 1992) (Posner, J.) (even assuming plaintiff is not required to make particular allegations, "plaintiff can plead himself out of court"; "[i]f he alleges facts that show he isn't entitled to a judgment, he's out of luck").

[2] *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2509 (2007); *Davis v. Bayless*, 70 F.3d 367, 372 n.3 (5th Cir. 1995).

members," the court invoked *Salerno* and identified circumstances under which the challenged statute could be lawfully applied to the association's members; "[u]nder those circumstances," the Eleventh Circuit held, "there would not be grounds for *alleging* an unconstitutional taking as to all of its members." *Id.* at 1322 (emphasis added). For that reason, the court held that "the district court did not err by granting judgment on the pleadings." *Id.* at 1322-23. The Second Circuit's decision teaches that an association's broad claim for relief on behalf of its members fails at the *pleading* stage if there are instances in which the statute can be constitutionally applied to the association's members; under that standard, TCTA's complaint would again be dismissed. *See* Pet. 18-21.

B. The petition further establishes that the Fifth Circuit — by relying on *Morales*'s account of facial-challenge rules rather than *Salerno*'s no-set-of-circumstances standard — deepens confusion in federal courts regarding the scope and vitality of *Salerno*. *See* Pet. 15-17.

In response, TCTA insists (at 14) that the Fifth Circuit cast no "doubt on *Salerno*'s validity" because the court "relied on *Morales* only for a point relating to standing." But the critical point is that, following TCTA's own argument, the Fifth Circuit held that *Salerno*'s rule is inapposite because TCTA is seeking relief only on behalf of its members and because *Salerno* may no longer be good law. *See* Pet. 15-16. Whether the Fifth Circuit credited those arguments in assessing standing or in assessing the adequacy of TCTA's claims more broadly, the decision below adds to the confusion regarding the scope and applicability of *Salerno* and the taxonomy of facial challenges.

TCTA also argues (at 14) that there is no confusion in the federal courts regarding *Salerno* because the decisions cited in the petition "state only that some of this Court's members have disagreed about" *Salerno*. This argument is particularly specious given TCTA's own efforts below to cast doubt on *Salerno*. *See* Pet. 15 n.7. As the Ninth Circuit has said, "[j]urisprudence appears to be *divided* on the question whether the *Salerno* 'no set of circumstances' standard is dicta or whether it is to be generally applied to facial challenges." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007) (emphasis added).

II. THIS IS AN APPROPRIATE VEHICLE

This case directly presents the issue of whether an association that challenges a legislative enactment across-the-board on the theory that it is unlawful on "the face of the statute" (Opp. 16) is subject to the rule of *Salerno*. That is a pure question of law that has been briefed and passed on below and that involves, among other things, reconciliation of this Court's decision in *Salerno* and the plurality in *Morales*. *See* Pet. 26-27. TCTA challenges the suitability of this case to address that question, but its arguments are misplaced.

A. TCTA argues first that, because the Fifth Circuit's holding comes in an unpublished opinion, plenary review is unwarranted. That is so, TCTA insists (at 6), because the Fifth Circuit itself can resolve "any . . . conflict." But it is very unlikely that the Fifth Circuit itself or the courts of appeals collectively will settle this issue without this Court's intervention: the Fifth Circuit's narrow understanding of *Salerno* is not an isolated phenomenon (Pet. 12 n.5); multiple courts of appeals have expressed confusion regarding the meaning and vitality of *Salerno* (Pet.

15-17); and this Court's guidance is particularly warranted to resolve the issue in view of the fractured nature of *Morales* and continuing criticism of *Salerno* (Pet. 26).

Furthermore, this Court has shown time and again that it is willing to review unpublished decisions. *See, e.g., Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 127 (1995); *Eastern Associated Coal Corp. v. United Mine Workers*, 531 U.S. 57, 61 (2000); *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001) (per curiam); *Los Angeles County v. Rettele*, 127 S. Ct. 1989, 1991-92 (2007) (per curiam). And with good reason: "[t]he fact that the Court of Appeals' opinion is unpublished is irrelevant. . . . An unpublished opinion may have a lingering effect in the Circuit[.]" *Smith v. United States*, 502 U.S. 1017, 1020 n.* (1991) (Blackmun, J., joined by O'Connor & Souter, JJ., dissenting from denial of certiorari). The Court should be particularly willing to review an unpublished decision where (as here) a lower court creates a circuit split by ignoring a fundamental limit on constitutional litigation. *See* Pet. 24-26. TCTA does not deny, moreover, that the Fifth Circuit's holding, although unpublished, may well affect the application of *Salerno* and *Morales* in associational facial challenges outside the Fifth Circuit. *See* Fed. R. App. P. 32.1; 5th Cir. R. 28.7.

B. TCTA also argues (at 7-12) that there is a dispute about the meaning of the Fifth Circuit's decision, which renders plenary review inappropriate. As TCTA sees it, the Fifth Circuit's decision is confined to standing and did not reach what it describes (at 4) as AT&T's "alternative ground for affirmance."

TCTA itself, however, has previously rejected this exact reading of the Fifth Circuit's decision. Shortly

after the Fifth Circuit's decision, TCTA informed the district court that the Fifth Circuit had "rejected alternative grounds for affirmance advanced by some of the intervenors." Letter from Henk Brands to Hon. Lee Yeakel at 1 (Feb. 19, 2008). TCTA said that AT&T advanced *Salerno* as "an alternative ground for affirmance," but that "[t]he court of appeals rejected the argument *on the merits*, holding that 'arguments that the dismissal of the complaint can be justified for failure to satisfy the standards of . . . a facial challenge[] lack merit.'" *Id.* at 2 (quoting Pet. App. 16a n.4) (emphasis added; ellipsis in original). TCTA subsequently reiterated this position to the district court. *See* Resp. App. 4a.

In any event, whether the decision below is limited to standing (Rule 12(b)(2)) or whether it also addresses issues relating to failure to state a claim (Rule 12(b)(6)) is of no moment. The applicability of the *Salerno* standard to associations can be properly considered under either rubric. The key fact is that the Fifth Circuit allowed TCTA to evade *Salerno* on the ground that "TCTA is only asserting the interests of its members . . . , rather than the interests of third parties," Pet. App. 16a n.4; *see* Opp. 10, regardless of the breadth of TCTA's claims and its requested relief. The petition establishes that that understanding of *Salerno* is deeply flawed, conflicts with decisions of other courts of appeals, and raises issues of recurring practical importance. *See* Pet. 12-15, 17-24, 25-26. Whether the Fifth Circuit's decision is read in terms of standing or whether TCTA stated a proper facial challenge, the decision disregarded the rule of *Salerno* on the ground that the association foreswore relief on behalf of third parties. It is *that* legal error that warrants this Court's review.

C. Finally, TCTA argues (at 16) that this case is an unfit vehicle because TCTA "has been joined by an individual plaintiff, Time Warner Cable," and because Time Warner Cable is bringing an "as-applied challenge." TCTA's stratagem of belatedly adding one of its members to the case does not diminish the necessity of review, for two reasons.

First, the associational plaintiff (TCTA) continues to seek broad, across-the-board relief for all its members based on the face of the statute and the same allegations made the day after SB 5 was enacted. The Fifth Circuit's holding remains directly applicable to TCTA's entitlement to relief.

Second, Time Warner Cable — along with TCTA — has itself taken the position that, "[a]t the summary judgment stage, plaintiffs may submit evidence relating to a limited number of municipalities that will exemplify how S.B. 5 affects incumbent cable operators." Letter from Henk Brands to John Barry at 4 (June 18, 2008). Time Warner Cable and TCTA thus purport to use "limited" illustrative examples of the supposed unlawfulness of SB 5 to warrant a sweeping request for statewide relief. That approach illustrates concretely that the scope and applicability of *Salerno* remain directly relevant to the litigation. *Cf.* Robert L. Stern *et al.*, *Supreme Court Practice* 259 (8th ed. 2002) (where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status").

III. TCTA CANNOT SATISFY *SALERNO*

A. Under *Salerno*, TCTA must establish that SB 5 is unlawful in all applications to TCTA's members. TCTA's complaint makes clear that it cannot satisfy that standard for two reasons.

First, TCTA has alleged only that *some* municipal franchises are more onerous than state-level franchises, *see* First Am. Compl. ¶ 22, which (just as in *Dinkins*) impliedly concedes that not *all* municipal franchises are more onerous than SB 5 franchises. Despite amending its complaint a second time, TCTA has left those qualified allegations in place. And the record demonstrates why TCTA cannot remedy these allegations: some municipal franchise agreements are, in fact, less burdensome than SB 5 franchises. *See* Pet. 18-19.

Second, in many parts of Texas, incumbents face no competition under SB 5 from either overbuilders or new entrants. *See* Pet. 20. The core of TCTA's claims is that SB 5 unlawfully treats incumbents differently from overbuilders. Yet TCTA seeks an across-the-board remedy that would allow incumbents to abandon their franchises everywhere in the State — based on purportedly discriminatory treatment of incumbents and overbuilders — even in municipalities where no overbuilder exists.

Because there are instances in which SB 5 may be lawfully applied, TCTA's members must pursue constitutional claims on a municipality-by-municipality basis. *See, e.g., Yazoo & Mississippi Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 219-20 (1912).

B. TCTA argues in response (at 16) that, "in the two instances that AT&T hypothesizes, S.B. 5 would still be just as unlawful." TCTA is wrong.

TCTA says (at 17) that it does not matter if an SB 5 franchise is more burdensome than a municipal franchise; TCTA must prove only that SB 5 treats incumbents differently, not worse. But mere difference in treatment is not sufficient to invalidate a statutory classification; the Constitution requires a plaintiff to be *disadvantaged* by a classification. *See Heckler v. Mathews*, 465 U.S. 728, 739-40 (1984) (equal protection plaintiff is one within a "disfavored group"). None of TCTA's authorities (at 17 n.28) supports the bizarre proposition that the Constitution gives plaintiffs who are unaffected by (or even benefit from) a classification a cause of action to strike it down,[3] and this Court's precedent is to the contrary. *Cf., e.g., Diamond v. Charles*, 476 U.S. 54, 66-67 (1986) ("Article III requires more than a desire to vindicate value interests.").

TCTA also argues that the Constitution requires that its members be free to abrogate their existing franchises — based on difference in treatment between incumbents and overbuilders — even in areas of Texas where there is not now and has never been an overbuilder. That is so, TCTA argues (at 17), because, "[i]f S.B. 5 made Catholic cable operators ineligible for state-issued franchises, AT&T could not avoid a finding of discrimination by arguing that some Catholic cable operators are not subject to competition from Protestant cable operators." While

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[3] *EEOC v. Inland Marine Industries*, 729 F.2d 1229 (9th Cir. 1984), is a Title VII case; the Ninth Circuit did not speak to whether a constitutional discrimination claim requires the plaintiff to be disadvantaged by a classification. The plaintiff in *United Teachers of Dade v. Stierheim*, 213 F. Supp. 2d 1368 (S.D. Fla. 2002), was materially harmed by the discrimination. *See id.* at 1374 n.3.

invidious classifications may inflict "stigmatizing injury" even if they do not put members of a class at any other disadvantage, *see Heckler*, 465 U.S. at 739-40 (Equal Protection Clause protects against classifications that "perpetuat[e] archaic and stereotypic notions" and "stigmatiz[e] members of the disfavored group") (internal quotation marks omitted), TCTA's objection to SB 5 is economic: it believes that the statute exposes cable incumbents to competition on a less than level playing field. TCTA does not allege that SB 5 imposes stigmatic harm on incumbent cable providers, and it is therefore insufficient to allege only that the legislation at issue distinguishes incumbent providers from other video service providers.

IV. A GVR IS WARRANTED

Subsequent to the Fifth Circuit's decision, this Court issued *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184, 1191 (2008), which emphasized the disfavored nature of facial challenges, provided a full discussion of the purposes of restrictions on facial claims, and announced a consensus standard for judging such claims. That decision undermines the foundations of the decision below and warrants a GVR.

First, *Washington State Grange* makes unmistakably clear that facial-challenge restrictions do more than govern third-party standing. *See* Pet. 29. Because the decision below rests on a contrary understanding of the purposes of such restrictions, *Washington State Grange* plainly undermines the basis for the decision. Contrary to TCTA's claim (at 18), moreover, this Court's elucidation of the purposes served by facial-challenge rules bears directly on whether TCTA's "lawsuit is [or is] not a facial challenge in

the first place." The purposes served by such rules — including *Salerno*'s no-set-of-circumstances standard — necessarily influence which claims are and are not subject to *Salerno*'s standard.

Second, this Court announced a new agreed-upon standard for facial challenges: "all [members of the Court] agree that a facial challenge must fail where the statute has a plainly legitimate sweep." 128 S. Ct. at 1190 (internal quotation marks omitted). Contrary to TCTA's assessment (at 19), this Court thus *did* "br[eak] . . . new ground." Indeed, in the short period since this Court's decision, several courts of appeals have relied on *Washington State Grange* in evaluating facial claims.[4] This standard, moreover, would compel dismissal of TCTA's claims because there are "plainly" instances in which SB 5's grandfathering provision may be "legitimate[ly]" applied to TCTA's members. *See* Pet. 17-21.

For these reasons, a GVR would neither "waste the Fifth Circuit's time" nor serve as "a tool for mischief," as TCTA asserts (at 19). The only possibility for "mischief" here is continued confusion in the Fifth Circuit and potentially elsewhere — in this case and in others — regarding the scope and applicability of this Court's rules governing facial challenges.

CONCLUSION

The Court should grant review of the Fifth Circuit's judgment or GVR in light of *Washington State Grange*.

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[4] *See, e.g., Warshak v. United States*, 532 F.3d 521, 529 (6th Cir. 2008) (en banc); *Baude v. Heath*, Nos. 07-3323 & 07-3338, 2008 WL 3115356, at *3 (7th Cir. Aug. 7, 2008) (to be reported at — F.3d —).

Respectfully submitted,

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